82-993

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALAN PATRICK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
NINTH DISTRICT COURT OF APPEALS
FOR SUMMIT COUNTY, OHIO

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STATEMENT OF THE QUESTIONS PRESENTED

I. Whether probable cause justifying the issuance of a search warrant is established by allegations in the affidavit that at best merely raise the suspicion, or assumption, that if a certain illegal activity was being conducted on the premises (i.e., gambling activity) then a search of the premises should reveal the presence of paraphernalia and other evidence usually related with such activity.

II. Whether the requirement that any property or things sought by a search warrant must be particularly described is satisfied by the generic designations of "U.S. currency" and "bank records" where the property so described cannot automatically be regarded as contraband, or evidence of any crime, and the warrant fails to set forth any basis for differentiating any property so described that was being legally possessed from that actually sought as contraband or as evidence of a crime by the warrant.

III. Whether any right conferred by the warrant in this case, to search a private home for evidence of illegal gambling, deteriorated into an unreasonble search when the police

proceeded to not only abuse the home itself, by ransacking it, but immediately following their entry required the occupants and guest to actually submit to the threat of armed force even though there was not even the suspicion that any of those so victimized were armed and dangerous.

IV. Whether property seized outside the catagories specified in the warrant can be admitted as proof of guilt.

V. Whether the evidence here which at best shows Petitioner's mere presence at the scene of a crime, was sufficient to support the verdicts returned herein.

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To the Honorable, the Chief Justice and Associate Justice of the Supreme Court of the United States:

The petitioner, Alan Patrick, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on October 13, 1982; when the Supreme Court denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B" in

the Appendix to this Petition.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C". Appendix "D" contains the Judgment Order of the Trial Judge finding the petitioner guilty. The Judgment Order denying the Motion to Suppress is designated as Appendix "E".

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered October 13, 1982. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth in Appendix "F".

STATEMENT OF THE CASE [1/]

I

The record shows that Alan Patrick was charged with the offenses of gambling, Ohio Revised Code §2915.02 (A) (2), and permitting premises to be used for such

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1/ Whenever reference is made in this petition to a page in the Record in the trial court, it will be preceded by the prefix "R". References to the Appendix to this petition, are noted as "Appendix ___p.____".

purposes, Ohio Revised Code §2915.03 (A)(2). He was convicted of these offenses following a Bench trial.

Prior to trial, the Court considered various "Motions to Suppress and for the Return of Illegally seized property". The petitioner contends that the various affidavits, upon which the search warrants in this cause were based, failed to set forth probable cause to believe "any" of the property sought thereby could be located at the places to be searched.

At the hearing on these Motions, the facts clearly showed the two home computers, found on the premises and searched hours after the original entry, "were not specifically described in the search warrant". Also, it was admitted that the police not only had no information that there were any computers in the home to be searched (R 64), but that they had never encountered any computers in any previous gambling investigations.

The evidence also showed one computer containing information supposedly relating to the illegal numbers game had to in fact be activated. This event was originally said to have occurred only after the officers sent out for a computer expert. The evidence showed, in addition to considerable items of jewelry that were seized for obviously indefensible reasons that these officers confiscated some $12,000.00 the family had in their safe, along with the safe deposit keys located therein. This discovery was relied on as the sole basis for the issuance of the warrant to search the bank deposit boxes, which resulted in the seizure of $122,000.00 found therein.

II

The determinative questions relating to the search and the confiscation discussed below are aptly postured by the following segment of the testimony presented during the Motion to Suppress Hearing. The officer testifying, admitted to being in charge of the search (SH 44). Here it was testified:

Q. Okay. Now, you took $12,000 and some [odd] dollars out of the safe. Could you connect that money up to any gambling when you took it? At the time that you took it?

A. At the time I actually took possession of the money?

Q. Yeah.

A. At that time, no.

Q. No. You took it so you could see if you could connect it up later.

A. Right.

Q. You saw the key there. You took that as well.

A. Yes.

* * *

Q. Do you know what was in the box?

A. I had a good idea.

Q. You mean that you could guess.

A. Yes.

* * *

Q. Now, you are saying ...[is] the affidavit that we have here in court, which you used as a basis of the warrant, creates probable cause to believe that there ... [was] going to be some money out there. That's the essence of what you're telling me.

A. Yes.

Q. Nobody told you they ever delivered any money to that house, did they, before you went there?

A. No, sir, not me.

Q. Nobody ever told you they saw any money in the house, did they?

A. No.

Q. Nobody ever told you that they saw a safety deposit box key on the premises, did they?

A. No.

Q. You had no information that there was a computer there, did you?

A. Correct.

Q. Now, when you saw that computer, you thought as you testified before that it could be adapted for gambling purposes.

A. Yes, sir.

Q. So, you sent ...[for] the expert and then later you seized it.

A. Yes.

Q. Right. Now, after you got down to the station here, they searched that computer again; is that right? They got some additional information out of it?

A. That's correct.

* * *

Q. Did they get a Search Warrant to search that computer?

A. Not to my knowledge (SH 62-64). (Emphasis supplied.)

III

Another officer, Detective Randall Barath, testified to having seen Roberson go into a Barber Shop on North Howard, stay a few minutes and leave (R 273-274). Next, he saw Roberson make a stop at City Hospital and at a home on Division Street (R 275). This happened on March 31, 1981 (R 276). Later that same day Roberson was seen by Barath at Patrick's home. Although Barath and his partners did not

actually see Roberson enter the house itself, Roberson was seen leaving the premises about 30 minutes later (R 277). This officer says they again surveilled Roberson April 1, 1981 at the Hospital (R 277-278).

On April 2, 1981, Barath saw Roberson arrive at Patrick's house at 2:30 in the afternoon, stay for several minutes and then depart, making several stops of brief duration before returning to Patrick's home (R 278-280).

Significant here Detective Barath admitted on cross-examination that he had not seen, during these surveillances, Roberson break any laws (R 282). Also, the officer denied having seen Roberson drop anything off at Patrick's home (R 283). Indeed, he candidly admitted the most that could be said was that Roberson "was stopping [at these several places] for some reason... [but he did not] know what the reason was" (R 284). Nor did he know why Roberson stopped at Patrick's home (ibid).

Detectives Smith and Hill were the other officers with Barath on the surveillances of March 31, April 1, and April 2. In his evidence Smith exaggerated how on one occasion, they had been following Roberson all over the West Side of Akron while Patrick was in his car as a passenger (R 295). The date referred to turned out to be April 2, 1981. However, his police report only showed Patrick was picked up at his home at 2:30, on April 2, by Roberson and stops were made on Trigonia, on Rhodes, on Douglas and on Nathan Streets. Alan Patrick was then

dropped off at a tire store in suburban Barberton, Ohio (R 300). What is significant here, is that it was the above route that the officer referred to as being "all over the West Side of Akron" (R 301). Also, Detective Smith, in response to questions put forth by the Judge, specifically testified that April 2, 1981 was the first time that he was close enough to see Patrick and that he really did not know at the time that "Patrick" was the person they were looking at (R 304).

Finally, we have the testimony of Detective Hill, who did know and, at all times, could identify Alan Patrick. Hill testified that he, and that had to include Detectives Barath and Smith, had Roberson under constant surveillance (R 336) from the last day in March, 1981. Hill testified, without equivocation, that he only saw Patrick with Roberson on April 2, the day Patrick was dropped off at the tire store in suburban Barberton.

IV

In a nutshell, the prosecutor's position, as was specifically argued to the Court in Summation, was that "The State ha[d] met its burden in showing that Alan Patrick was in the house having custody of the house, that the computers [with gambling information in them] were in the house and that... [this shows] the premises were used in gambling in violation of §2915.02" (R 378).

Actually, the evidence reon for Patrick's conviction is not in serious dispute. For, despite certain grandiose

promises, made in the State's opening statement, acquittals were rendered by the Court in favor of Patrick's wife and Brown, both of whom were arrested and charged (R 382). If nothing else this fact rather dramatically demonstrates the State's failure to prove that "Alan Patrick was indeed running a gambling house, that he was gambling with the aid of Sandra Patrick, was also operating a gambling house in her workings with the computer and also Barry Brown" (R 6-7).

What the evidence does show is the very exploratory search that was indeed made of Patrick's home on April 24, 1981. It also shows the testimony by the various officers referred to above, regarding surveillances made by them. Additionally, the arrest of a Charles Roberson, who was stopped and his car searched, was established. This event, which also took place on April 24, 1981 (R 268), produced, in addition to some blank pads, a particular pad dated April 24, 1981 with some numbers on it.

At best, the evidence upon which the guilty verdicts had to be based only shows that Patrick, who just happened to be home when the police arrived, admitted them upon being advised of their purpose. His wife and Brown, both of whom were charged and acquitted, were found in the room where the two home computers were located. Both testified that Brown was trying to teach Mrs. Patrick to operate the device so that it could be programmed to accomodate the various real estate operations the Patricks were involved with. (The fact that there was no writing, number pads, slips or the like that could

have been used as source material for the numbers and figures in the computer is another fact that must be reckoned with.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The various arguments made below make it most apparent the conviction of Alan Patrick must be reversed. While the conviction itself is indefensible for a number of reasons, certain testimony developed during the Suppression Hearing shows the extreme need for this court to intervene in this cause if for no other reason than to emphasize that the issuance of a search warrant (1) does not provide the officers executing it a license to ransack. And (2) it does not have the effect of automatically depriving individuals present during its execution of their basic rights.

Here we refer to testimony showing these officers were convinced they had the right to order the homeowner, whose premises were being searched and ransacked by the police, "to sit in a certain place and [to] deny him the right to use the phone" (SH 55) even to "call an attorney" (SH 57). Significant here, while the reasons given by the police for taking this drastic action are serious enough (SH 56-58); a police officer's testimony as to being unaware that they were suppose to leave the property in the condition they found it (SH 58) is a type of "insolence of office" that must be curtailed at all cost. Even this is not all, one of these officers truly believed (as he testified) that the police had the power not only to ransack (SH 59) this home, but to take money out of Mrs.

Patrick's purse, and her personal jewelry (R 421-425). Further, this officer was convinced that if need be they actually had the power "to damage ... [the] home" to remove a built-in safe in order to open it at their convenience (R 22). These ill-conceived and ill-advised notions of the Akron Police Department, which have been sanctioned by the various Ohio Courts below, are in serious conflict fundamental criteria as articulated by this Court. That theme has always required the conduct of the police to be reasonable. United States v. Pratter, 465 F.2d 227 (7th Cir. 1972) and United States v. Likas, 448 F.2d 607 (7th Cir. 1971).

Of course, our main contention is that the affidavit simply failed to set forth cause to believe any of the property sought could be located in Petitioner's home. Hopefully then this Court will be persuaded by the arguments made below that missing from the affidavit was the "critical link in the chain of facts and circumstances" alleged to support the issuance of any warrant to search Patrick's home or person. See United States v. Lockett, 674 F.2d 843 (11th Cir. 1982).

Finally, the point is made by Petitioner that the seizure of the money, from the home and the deposit box cannot be justified under fundamental criteria. See United States v. Giresi, 488 F. Supp. 445, 459 (D.Md. 1980).

I. The Conclusion That Probable Cause Existed To Justify The Issuance Of A Search Warrant Is Not Established By An Affidavit Which Merely Raises The Suspicion Or Assumption That If A Certain Criminal Activity Is Taking Place On The Premises, Then A Search Thereof Should Reveal The Presence Of Paraphernalia And Other Evidence Usually Related To Such Activity.

In defending the issuance of the search warrant for the Petitioner's home, the State rather understandably has relied on the tenet, originally expressed in United States v. Ventresca, 380 U.S. 102 (1965), that an affidavit should be analyzed from a commonsense standpoint. On the other hand, our assailment of the State's position starts with the idea that to justify theissuance of any search warrant the prevailing axiom is that there must be a meaningful showing that property subject to seizure can be located in the place to be searched. See Rice v. Wolff, 513 F.2d 1280, 1285, rev'd on other grounds, 428 U.S. 465 (1976). Simply put, the nexus between the places searched and the property sought by virtue of the warrant is always critical to the question as to whether probable cause to search for such property is set forth in the affidavit. United States v. United States District Court, 407 U.S. 297, 316-317 (1972).

As to the sufficiency of the affidavit to support any belief the described gambling paraphernalia and "U.S. Currency" related thereto would be in the Patrick home, see United States v. Scott, 555 F.2d 522 (5th Cir. 1977), and the cases cited therein at pages 526-528. There, as here, it was shown that no one was even credited by the affiant with having seen, or having any knowledge as to the presence of, the property sought by the warrant in the home searched. Significant here, the court specifically deemed critical the averment, in the Scott affidavit, that:

> All of the sources and informants named Moore as the person in charge of the Atlanta numbers game during 1973 and 1974. The affidavit further recited that in the experience of affiant, persons engaged in illegal number lotteries usually kept lottery items in their headquarter residences and vehicles and specifically set forth information and indicating that Moore was in fact transacting lottery-related business at home. Id., at 527.

Based on the above quoted analysis, the court in Scott then jumped from a belief that Moore, the person victimized by the search, was shown by the affidavit to be the "boss" of the numbers operation to the conclusion that he would have

gambling paraphernalia in his home. While we still maintain Scott was wrongly decided on this point, and should have been reviewed by this Court, cert.denied, 434 U.S. 985 (1977), the case at least exposes the presence of certain vital factual flaws in the affidavit relied on for the search here. Not only did this affidavit fail to articulate any specific basis for the affiant's belief that particular property would be in Alan Patrick's home, it also failed to credit the affiant with the belief based, as it is usually said, on his experience that there was a good likelihood that such property would be in the house.

In the present case, the sole basis for the affiant's belief that the property ultimately specified in the warrant could be found in, or at, the places to be searched was based on the following rather omninum-gatherum averment that:

> "Affiant believes and has good cause to believe that there is not being illegally possessed, pursuant to the commission of a gambling offense, contrary to §§2915.02 and 2915.03 of the Ohio Revised Code, certain books, records, U.S. Currency, bank records, and gambling paraphernalia consisting of slips of paper with numbers listed on the face thereof and commonly known as numbers slips, paper slips, phones, phone records, scratch pads, tablets, adding machines, envelopes, tally sheets and other items

used for gambling in violation of Ohio Revised Codes §§2915.02 and 2915.03."

The master affidavit that formed the basis for numerous warrants simultaneously executed at various locations in Akron on April 24, only referred to Petitioner and/or his home in ¶¶3,40,76,100,102,104, and 106.

¶¶3 & 40 merely furnished descriptions of our Petitioner and his home. ¶76 contained the naked assertion, attributed to some nameless informant that Patrick was in the informant's estimation, "The largest numbers man in Akron."

¶¶102,103, & 106 show an individual named Robinson was seen by police on March 31, at 11:15 driving on Howard street, making a stop on Division street, returning to Howard, then going to an address on Lods street next to a bar and from there to Patrick's home arriving at 2:42 p.m. On April 1, at 12:00, Robinson was again seen on Howard street, from there he went to a hospital, to Division, to Jay Ave., back to the bar on Howard street and from there to Patrick's home where he stayed until 2:55 p.m. On April 2, at 2:30 with two unknown passengers he departed and after stopping at several different addresses he returned to Patrick's home at 4:45 p.m. The other reference (in ¶100) simply states that on March 24, a car, later identified as Robinson's arrived at Patrick's home at 2:40 p.m.

Our thesis is supported by the reasoning in United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970), where the court concluded on the basis of somewhat comparable factual allegations that:

> The affidavit revealed no factual observations...[showing the contraband was] at Flanagan's residence. The inference that the goods were, or might be, at Flanagan's residence was entirely the District Attorney's. Id.at 747.

Indeed, the Flanagan court held that the affidavit raised no more than a suspicion that property subject to seizure could be located in the home. Id., at 747. See also United States v. Taylor, 599 F.2d 832 (8th Cir. 1979) and Commonwealth v. Taglieri, 390 N.E. 2d 727 (Mass. 1979).

See also Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966), which, like the situation here, involved a search made in connection with an alleged gambling operation. The court there emphasized, in a comparable situation, that:

> There was nothing in either the officer's affidavit or his statement that... [the] residence was, or was reputed to be, a place where gambling was being carried on, so as to entitle any cards or dice he might possess there to be made the subject of search and seizure as instrumentalities of such an establishment. Id., at at 5-6.

The fact that the above statement from Gillespie was premised by the idea that neither "cards nor dice nakedly constituted contraband", Id., at 5, adds to our contention that there was no probable cause to believe that any of the property listed in the "boiler plate" language of our affidavit would indeed be in the home. This same point was made in Montilla Records of Puerto Rico v. Morales, 575 F. 2d 324 (1st Cir. 1978). There the court expressly refused to even "signal a rule allowing general warrants with a generic description to issue solely on evidence that particular and easily differentiated contraband of that description was to be found on the premises... [because to do so] would be an unnecessary and dangerous dilution of search warrant requirements," id., at 327.

Again, the point being made is that the assertion in the affidavit, even as supported by the inferences reasonably drawn therefrom, simply do not support the conclusion that probable cause existed to search Patrick's residence or to seize his funds. United States v. DiNovo, 523, F.2d 197 (7th Cir. 1975) and United States v. Quinn, 454 F.2d 29 (5th Cir. 1972). Stated another way, the facts alleged in the affidavit failed to establish a nexus between Patrick's home and the evidence sought or seized. United States v. Green 634 F.2d 222 (5th Cir. 1981) and United States v. Gramlich, 551 F.2d 1359 (5th Cir. 1977).

II. Since Probable Cause To Search For, And To Seize Particularly Described Property Is Not Supplied By Conjecture, Assumption Or Mere Guesswork It Follows That Unless The Particular Property Sought, Here "U.S. Currency" And Records, Can Be Automatically Regarded As Contraband, An Instrumentality, Or Even Evidence, Of A Crime, Other Factors Further Describing The Specific Property To Be Seized Must Be Set Forth In The Warrant.

Our concerns here centralizes the warrant's direction that any "U.S. currency" found on the premises was to be seized. And, the ultimate seizure of the $122,000.00 from the safe deposit boxes. Of course, it simply cannot be denied that these officers regarded any money found on the premises as being subject to seizure. Proof this was their belief is magnified by testimony showing that not only was money in Mrs. Patrick's purse taken, but so was her wedding rings.

Money, to be sure, does not take on any criminal or evidentiary character absent other factors that demonstrate it has some connection with a criminal offense. Thus, it must be the law, even in Ohio, that more of a description of any money to be seized, assuming the warrant was otherwise sufficient, was required than the mere general description "U.S. currency". Indeed, as put by

one court a warrant must give the officer "information by which he could select certain property within the description in the warrant and refuse to take other property equally well described in the warrant." People v. Prall, 314 Ill. 518, 145 N.E. 610 at 612 (1924); People v. Holmes, 20 Ill. App. 3d 167, 312 N.E. 2d 748 (1974). In Holmes, the warrant sought "an undetermined amount of United States currency". There it was reasoned that the description "United States currency" was too vague and that a more general description of the denominations and approximate amount of the currency should have been given.

The holdings in Prall and Holmes, seem especially compelling since they expose the conclusion that money and the other physical property listed in the warrant would be on the premises as being purely an assumption by the affiant. Also, implicated in this analysis is the idea that the particularily requirement of the Fourth Amendment has as one of its purposes precluding officers executing warrants from actually seizing property for which he lacked probable cause to believe was connected with a particular criminal activity. See also United States v. Burch, 432 F. Supp. 961 (D. Del. 1977) aff'd 577 F.2d 729 (3d Cir. 1978), where the description of, among other things, "automobile tapes... [and] other unknown articles which are believed to be stolen from Penn Central Railroad" was held to be a general warrant. The Burch holding seems most relevant since there was no support in our affidavit for the required determination that there was probable cause to believe any money on

the premises would be sufficiently connected with a gambling operation to justify its seizure. Here, of course, there was absolutely no basis for any belief the money seized by these officers could ever be so connected. See Commonwealth v. Taylor, 418 N.E. 2d 1226 (Mass. 1981) and State v. Sweat, 427 Atl. 2d 940 (ME. 1981).

III. The Right To Search A Private Home Granted By A Warrant Does Not Confer On The Police The Right To Ransack And To Otherwise Abuse The Premises Or Its Occupants And Guests, And When Such Conduct Occurs Its Magnitude Can Cause A Search That Would Otherwise Be Lawful To Deteriorate Into An Unreasonable Search That Offends Constitutional Rights.

In this case, the evidence clearly shows that when the police arrived they were readily admitted. The officers then laid seige on the home in a fashion that can only be described as totally outrageous. Here, the evidence shows that at the very inception of the search itself, these officers, with drawn guns literally required those in the home to freeze and to remain in such a position for an inordinate period of time (R 419-420). All those present were personally searched by the rampagers despite the fact that only a warrant to search the petitioner and his home had been issued. Also, in prostituting the orders of the court to conduct a search for certain evidence, wilfully furniture was damaged and garbage

trash dumped on the floor and carpet.

It is recognized that "a warrant to search for contraband grounded on probable cause implicitedly carries with it the limited authority to detain its occupants on the premises while a proper search is conducted". Michigan v. Summers, 452 U.S. 711 (1981). This, however, is not to say that the police can in fact treat the people who happened to be present as though they are under arrest. In our case, the lawfulness of the police officers' conduct with regards to Petitioner and the others who were present in the home must be measured by tenets that distill from Ybarra v. Illinois, 444 U.S. 85 (1979) and Dunaway v. New York, 442 U.S. 200 (1979).

In Ybarra the point was made that nothing in Terry v. Ohio, 392 U.S. 1 (1968) "can be understood to allow a generalized cursory search or, indeed, any search whatsoever for anything [on an individual] but weapons". 444 U.S. at 93-94. Of course, it cannot be denied that the original testimony was that it was hours after the seizure before the computer was activated and what was regarded as a gambling print-out developed. Yet, the way all of those on the premises were treated before anything that could possibly be contraband was located, cannot logically be distinguished from the way they would have been treated if under arrest. See United States v. DiRe, 332 U.S. 581 (1948).

Surely, it will be agreed that the right to search a home only authorizes just that-- a search. And, who would

sisting of... [certain other generally enumerated items]". We start with the clear and precise testimony by the officer that not only were they unaware of the presence of any computer in the home, but they had never encountered any computer in their investigations.

Again, the facts also show that to abuse the premises by a general ransacking and by illegally restraining and searching the person of others, for who they did not have search warrants these officers willfully and arrogantly seized personal jewelry from the safe and from the person of Mrs. Patrick. In addition, they took records and data that obviously related to real estate and other legitimate business transactions on their own authority.

While the jewelry and certain records were ultimately returned by the police (SH 61-62), this response can hardly exonerate their seizure, or otherwise save this search from being deemed general or exploratory. In our judgment the seizure of the jewelry, the funds from Mrs. Patrick's purse, and her wedding rings can no more be justified than can the seizure of computers and the computer diskettes.

It is because the computers and the diskettes furnished the only evidence in this case that could possibly provide a basis for Patrick's conviction that our concentration on its seizure will be more intense. As was true with the jewelry, the money and even the safety deposit box keys, it cannot be seriously argued by the State that it was "immedi-

argue that the right to search authorizes the police to act other than reasonably--a concept that is decidely at odds with the type of abusive conduct that was visited on this defendant's home. Also, a right to search on the basis of a warrant must be distinguished from a right to arrest. Hence, police conducting a search have no right to prevent any person on the premises from seeking legal counsel. This follows unless it can be said that one who is placed under arrest has the right to immediate access to counsel, but if his home is being searched he lacks such a right. (See SH 55, et. seq.).

The overall conduct of the police in this case during the execution of the warrant can be favorably compared with the conduct of the F.B.I. agents at the offices of the Founding Church of Scientology in In Re Search Warrant, the case cited above. There the court found that the conduct of the agents was the type of egregious violation of constitutional requirements that require an application of the exclusionary rule to the property seized. 436 F.Supp., at 692.

IV. The Seizure Of Property Outside The Categories Specified In The Warrant Violates The Particularity Requirement And Calls For The Suppression Of All Property Seized.

The warrant instructed and the police were directed to seize "certain books, records, U.S. currency, bank records and gambling paraphernalia con-

ately apparent" to the police that, although not listed in the warrant, these computers were in fact evidence or contained evidence in its memory banks. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). Also, see State v. Williams, 55 Ohio St. 2d 82, 377 N.E. 2d 1013 (1978), where the Ohio Supreme Court viewed a generalized suspicion, such as these officers had with reference to the computers (SH 64) as not making the evidentiary value of such property "immediately apparent." Cf. State v. Wilmoth, 1 Ohio St. 3d 118 (1982).

All this makes it clear that the seizure of the computers and the diskettes, which were outside the list of property to be seized, should not have survived our contention that the Motion To Suppress was improperly denied. The fact that the officer originally forthrightly conceded that, although he felt the computer could possibly be a criminal tool, he could not make that judgment until the computer was activated (SH 50-51), which occurred after the expert had been sent for, Id., at 52-53, is most critical. Indeed, it was his testimony that it was only after the expert created a printout that he then concluded the computer "could have been used for gambling operations." (SH 68) (Emphasis added). On this rather critical point see Stanley v. Georgia, 394 U.S. 557 (1969), where officers found reels of film while searching a home for gambling paraphernalia, which they viewed with a projector found on the premises. There the point was made, in the concurring opinion, that this conduct amounted to an illegal search.

See also United States v. Rettig, 589 F.2d 418 (9th Cir. 1978), where because of the conduct of the agent in deliberately failing to advice the court issuing the warrant of the intended scope of the search an otherwise valid warrant was struck down. The critical point in Rettig was that the agents interpreted and executed the warrant as "an instrument for conducting a general search." Id., at 423. Cf., In Re Search Warrant, 527 F.2d 321 (D.C. Cir. 1977) cert. denied, 438 U.S. 925 (1978).

V. Evidence Is Insufficient To Support A Guilty Finding Where, Making All The Reasonable Inferences In Favor Of The State, A Reasonable Juror Could Not Find From Such Evidence Guilt Beyond A Reasonable Doubt.

Jackson v. Virginia, 443 U.S. 307 (1979), establishes the constitutional standard for any meaningful review of the sufficiency of the evidence to support a conviction. Relevant to that question, as postured here, is the cogent principle that presence at the scene of a crime here, the illegal possession of "gambling paraphenalia" by someone in a defendant's home, alone never suffices to prove guilt beyond a reasonable doubt even of illegal possession. Compare State v. Haynes, 25 Ohio St. 2d 264 (1971). Indeed the law in Ohio had been thought to be clear beyond any possible doubt that "the mere presence of an accused at the scene of some crime and the fact that he is acquainted with the perpetrator

is not sufficient proof, in and of itself, that he was an aider and abettor." Columbus v. Russell, 39 Ohio App. 2d 139 (1973), and State v. Clifton, 32 Ohio App. 2d 284 (1972).

The above analysis, when applied full strength to the search warrant affidavit and to the evidence presented at the trial, shows and mirrors the extent to which Alan Patrick has been victimized both by the denial of his Motion to Suppress and by the guilty verdicts rendered against him.

We know, of course, that none of the officers who reported even having seen Alan Patrick during the various surveillances ever saw him doing anything. In fact, the evidence presented as proof of guilt only shows him as having been seen on April 2, 1981 in company with a Charles Roberson (R 304 and 336). Thus, even if Roberson was indeed picking up numbers, and there was no proof he was, Patrick's presence in the car would not be proof of any joint criminal venture or endeavor as between those two. And, just as surely this fact would have no tendency to prove Patrick was also guilty of the crimes for which he stands convicted.

As to the information in the computers, said to be evidence of an illegal numbers programs, the most that can be said is that Alan Patrick also lived in the home. Still the fact to be reckoned with is there was no proof, indeed the opposite was shown, that he even knew how to work the computers (R 429-430). Also, both of the acquitted Defendants

testified to their exclusive use of the machines (R 392 and 429). When the irrepressible thrust of this evidence is augmented by the idea that there was no source information on the premises that could possibly have been used to create the so-called programs in the computer (-- that is, any records of wagers and the like) further belies any argument either that the computers were involved in charged offenses or that Patrick was involved with any criminal use of the computers.

In any event, one must look in vain for proof that Alan Patrick indeed committed the charged offenses. This is so even though there may be every reason to speculate as to his possible guilt. For who can deny that any such speculation would be contrary to the admonition in In Re Winship, 397 U.S. 358 (1970), that:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. Id., at 364.

So postured, a fair distillation of the Trial Court's articulated findings,

which ostensibly lead it to convict, really leaves one with the feeling that the Judge must have indulged in conjecture, supposition and speculation to reach his verdicts. See Appendix "D", at page A21. But these are not the things proof of guilt should be made of.

First, we refer to the Court's findings that on October 1, 1981, Patrick was in Charles Roberson's car when Roberson made several stops at a certain private residence and businesses in the city. Id., at A18. Second, there is the finding that stored in the memory bank of one of the two computers found in the petitioner's home was information said to be related to a computerized numbers operation. Id., at A19.

Our point is that while all this may very well be true, the question still remains: where is the proof that Alan Patrick was criminally involved? As to this question the Court will surely agree that due process necessitates a reversal where no rational trier of fact could have found the essential elements of the crimes charged here were proven beyond a reasonable doubt. Jackson v. Virginia, supra, 443 U.S. 307 at 319 (1979).

This court will surely agree that more than Patrick's mere presence in his own home (even supposing his wife and a guest in the home were in fact working in an isolated room on a computer that contained in some of its memory banks a gambling program) was required to justify his conviction in the case. United States v. Willis, 646 F.2d 189 (5th Cir.

1981), seemingly would support this thesis. The same is true of United States v. Jackson, 588 F.2d 1046 (5th Cir), Cert. denied, 442 U.S. 941 (1979) and United States v. Stephenson, 474 F.2d 1353 (5th Cir. 1973).

This rationale seems especially compelling here since unlike the situation in Jackson it was not shown Patrick was even near the contraband. (In Jackson the defendants came very close to entering the room where the contraband laden luggage was located.) In Stephenson the proof only showed an apparent suspicion that he was involved in Drugs. There was no proof he had any actual contact with the drugs that were found in the Bar.

So in this case, while there is proof of Patrick's presence in the house when the "contraband" figures were located in one of the computer's memory banks, which computer also contained evidence it was being programmed to accomodate a legitimate real estate operation.

We concede the presence of a reluctance to reverse any criminal conviction. What, however, cannot be overlooked remains. This case should not be closed out with out any court having articulated a meaningful resolution of our chief complaints. Simply put the facts here support the untenable notion that Patrick was convicted as a sacrifice. For the chief issue here brought into conflict Patrick's guarantee that any guilt on his part should have been based on sufficient evidence and the State's

interest in conviction because someone was responsible for the gambling information being in the computers.

Given the absence of any real proof of Alan Patrick's guilt, this Court ought not be another trough from which the State satisfies its thirst for a validated conviction of Alan Patrick. This idea will become even more compelling when this Court attempts in vain to plot the evidence in this case against the elements of the charged offenses. For any evidence that can possibly be devined from this record will not reach that degree of probative force the law requires for a conviction. State v. Stiles, 179 N.E. 2d 76 (Cuy. Cty., Ohio 1962).

CONCLUSION

This case dramatizes the cogency of the point, emphasized by Justice (then Judge) Stevens, in United States v. Pratter, to the effect that "the execution of a warrant is a job for a professional, trained both to perform his mission and to heed the... command to show a decent respect for the privacy of the citizen" (465 F.2d, at 231). And, it screams out for this Court to make it clear that probable cause remains the standard required to support the issuance of a warrant.

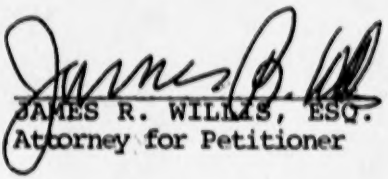
For all of the foregoing reasons it is respectfully submitted that the Petition for Writ should be granted.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner for Writ of Certiorari was mailed to the office of Saundra Robinson, Akron City Prosecutor, 53 E. Center Street, Akron, Ohio 44308, this 7 day of December, 1982.



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